RECORD AND BRIEFS

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No. 15-1504

IN THE

Supreme Court of the United States

RUSSELL L. OVERTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether petitioner's conviction must be set aside under *Brady v. Maryland*, 373 U.S. 83 (1963).

PARTIES TO THE PROCEEDING

Petitioner in No. 15-1504 is Russell L. Overton, appellant below.

Petitioners in No. 15-1503 are six of Overton's co-defendants—Charles S. Turner, Christopher D. Turner, Levy Rouse, Clifton E. Yarborough, Kelvin D. Smith, and Timothy Catlett—likewise appellants below, who petitioned this Court separately for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case. The Court also granted their petition, and consolidated the cases.

Respondent in both cases is the United States of America, appellee below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

INTRODUCTION 1

STATEMENT OF THE CASE 4

A. Background And Trial Proceedings 4

B. The Exculpatory And Impeachment Evidence Withheld By The Government 12

C. Post-conviction Proceedings 19

SUMMARY OF ARGUMENT 22

ARGUMENT 27

I. A Criminal Defendant Is Entitled To A New Trial When The Prosecution Withholds Material Information Favorable To The Defense 27

II. The Exculpatory And Impeachment Evidence Suppressed By The Prosecution In This Case Is Material 30

A. The Government's Case Against Overton Was Weak, And The Jury Repeatedly Deadlocked Before Reaching A Verdict 30

TABLE OF CONTENTS
(continued)

Page

B. The Suppressed Evidence Would Have Further Undermined The Government's Already Weak Case Against Overton And Significantly Strengthened His Defense, Creating At Least A Reasonable Likelihood Of A Different Outcome 34

1. *The Prosecution Suppressed Evidence That Could Have Been Used To Challenge The Government's Group-Attack Theory And Offer The Jury A Compelling Counter-narrative of the Crime* 34

2. *The Suppressed Statement Identifying James Blue As Mrs. Fuller's Lone Assailant Could Have Provided Further Support For An Alternative, Single-Perpetrator Theory Of The Crime* 43

3. *The Suppressed Evidence Would Have Enabled The Defense To Challenge The Thoroughness And Accuracy Of The Investigation, Further Weakening The Prosecution's Case* 46

TABLE OF CONTENTS
(continued)

Page

4. *The Government Withheld Evidence That Would Have Impeached Purported Eyewitness Carrie Eleby's Testimony In A Powerful New Way, Which Alone Could Have Resulted In An Acquittal* 49

CONCLUSION 54

TABLE OF AUTHORITIES

Page(s)

CASES

Banks v. Dretke,
540 U.S. 668 (2004) 51

Banks v. Reynolds,
54 F.3d 1508 (10th Cir. 1995) 37

Berger v. United States,
295 U.S. 78 (1935) 27

Boyette v. Lefevre,
246 F.3d 76 (2d Cir. 2001) 36

Brady v. Maryland,
373 U.S. 83 (1963) 3, 19, 28, 36

Castleberry v. Brigano,
349 F.3d 286 (6th Cir. 2003) 37

Catlett v. United States,
545 A.2d 1202 (D.C. 1988) 11, 12

Clemmons v. Delo,
124 F.3d 944 (8th Cir. 1997) 37

DiLosa v. Cain,
279 F.3d 259 (5th Cir. 2002) 37

Gantt v. Roe,
389 F.3d 908 (9th Cir. 2004) 32

Giglio v. United States,
405 U.S. 150 (1972) 50

Kyles v. Whitley,
514 U.S. 419 (1995) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Lambert v. Beard,
537 F. App'x 78 (3d Cir. 2013) 36

Leka v. Portuondo,
257 F.3d 89 (2d Cir. 2001) 44

Lindsey v. King,
769 F.2d 1034 (5th Cir. 1985) 48

Mendez v. Artuz,
303 F.3d 411 (2d Cir. 2002) 37

Napue v. Illinois,
360 U.S. 264 (1959) 53

Smith v. Cain,
132 S. Ct. 627 (2012) ..... *passim*

Spicer v. Roxbury Corr. Inst.,
194 F.3d 547 (4th Cir. 1999) 32

Strickler v. Greene,
527 U.S. 263 (1999) 27, 28, 29, 32

Trammell v. McKune,
485 F.3d 546 (10th Cir. 2007) 47

United States v. Agurs,
427 U.S. 97 (1976) ..... *passim*

United States v. Bagley,
473 U.S. 667 (1985) 53

United States v. Garner,
507 F.3d 399 (6th Cir. 2007) 45

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Gray,
52 F. App'x 945 (9th Cir. 2002) 45

United States v. Jernigan,
492 F.3d 1050 (9th Cir. 2007)..... 37

United States v. Morales,
746 F.3d 310 (7th Cir. 2014)..... 44

Wearry v. Cain,
136 S. Ct. 1002 (2016).....*passim*

Williams v. Ryan,
623 F.3d 1258 (9th Cir. 2010)..... 36

Wood v. Bartholomew,
516 U.S. 1 (1995)..... 44

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V..... 1

STATUTES

28 U.S.C. § 1257..... 1

D.C. Code § 22-4135..... 19

D.C. Code § 23-110..... 19

OTHER AUTHORITIES

Patrice Gaines, *A Case of Conviction*,
Wash. Post, May 6, 2001 18

Paul Duggan, *Life Without Parole Ordered in D.C. Woman's Slaying*,
Wash. Post, Oct. 2, 1993..... 16

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 116 A.3d 894, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-84a.[1] The opinion of the Superior Court of the District of Columbia is unreported and is reprinted at Pet. App. 85a-139a.

JURISDICTION

The District of Columbia Court of Appeals issued its decision on June 11, 2015, Pet. App. 1a, and on January 14, 2016, denied a timely petition for rehearing and rehearing en banc, Pet. App. 140a. On March 24, 2016, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to May 13, 2016. On April 27, 2016, the Chief Justice further extended the time within which to file until June 10, 2016. The petition for a writ of certiorari was filed on June 10, 2016, and granted on December 14, 2016. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall ... be deprived of life, liberty, or property, without due process of law ... ." U.S. Const. amend. V.

INTRODUCTION

Petitioner Russell Overton is one of ten individuals jointly tried for the 1984 robbery and murder of

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[1] All "Pet. App." citations herein refer to the Appendix to the Petition in No. 15-1504.

Catherine Fuller. At trial, the government contended that a large group of young people—including all of the defendants, as well as two cooperating witnesses who testified for the government—had attacked Mrs. Fuller. After a week of deliberations, the jury convicted six of the defendants, acquitted two, and told the court that it would be "impossible" to reach a unanimous verdict as to the two that remained—Overton and Christopher Turner. The court instructed the jury to keep deliberating; only after further claims of impasse and forty to fifty more votes did the jury ultimately return convictions against both Overton and Turner.

More than two decades later, it emerged that the government had withheld from the defense an array of critical exculpatory and impeachment evidence. Among other things, the government did not disclose the identity of a man, James McMillan, who multiple witnesses saw acting suspiciously at the murder scene and fleeing as the police arrived—even though the government knew that McMillan had assaulted and robbed two other middle-aged women in the neighborhood where forty-eight-year-old Mrs. Fuller was robbed, beaten, and killed. The government did not disclose statements from several other witnesses that suggested the government's large-group theory of the attack was incorrect. The government did not disclose an eyewitness statement identifying another man unconnected to Overton or any of the other defendants, James Blue, as the victim's lone assailant. And the government did not disclose evidence that one of the government's purported eyewitnesses—the witness on whose testimony Overton's conviction

likely turned—had induced another witness to lie to implicate someone else in the crime.

The government's failure to disclose that information violated Overton's due process rights. Under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, constitutional error results from the government's suppression of evidence favorable to the defense if there is any reasonable likelihood the evidence could have affected the judgment of the jury—i.e., if the evidence is "material." That standard is easily satisfied here. Given the quantity and import of the suppressed evidence, it would have been material in the context of almost any trial. But the substantial weaknesses in the government's case against Overton—weaknesses that caused the jury to take scores of votes and repeatedly deadlock before ultimately convicting him—make the materiality of the withheld evidence especially clear in his case.

No physical evidence tied Overton or any of his co-defendants to the crime. The three purported eyewitnesses who implicated Overton in the attack all had serious credibility problems. And the jury clearly did not fully credit the testimony proffered by two of them—the cooperating witnesses who were the centerpiece of the government's case—as the jury acquitted one of Overton's co-defendants who both of those witnesses described as an active participant in the crime. Only one additional witness claimed to have seen Overton participate in the attack. The government itself was "very skeptical" of her story, and the suppressed impeachment evidence would

have discredited her testimony in a distinct and powerful new way.

The evidence withheld by the prosecution in this case not just undermines, but completely eliminates, any basis for confidence in the jury's verdict of guilt for Russell Overton. The government's suppression of material exculpatory and impeachment evidence entitles Overton to a new trial that comports with the requirements of due process.

STATEMENT OF THE CASE

A. Background And Trial Proceedings

1. On October 1, 1984, forty-eight-year-old Catherine Fuller was robbed, sodomized, and murdered in an alleyway garage near the intersection of Eighth and H Streets in Northeast Washington, D.C. Pet. App. 5a. Police found no physical evidence at the scene linking anyone to the crime. *See, e.g.*, Pet. App. 53a; JA 183; A2361–62.[2] Their investigation of Mrs. Fuller's murder was guided instead by an anonymous tip received at 2:45 a.m. the night of her death. A1370. The caller told police that he "knew about 7 or 8 subjects that hung in the alley" that "call themself [sic], The 8th and H Crew." *Id.* Over the next several days, police and prosecutors developed the theory that a large group of young people had attacked Mrs. Fuller. A2484; A2590.

The police were initially unsuccessful in finding witnesses who could support that theory. *See* A2484–85. The case presented at trial began to take

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[2] "A__" citations are to the Appendix in the D.C. Court of Appeals.

shape when, nearly two months after Mrs. Fuller was killed, a detective interviewed sixteen-year-old Carrie Eleby about an unrelated fight at a concert. *See* A2548–50. During that discussion, Eleby volunteered that she knew who had killed Mrs. Fuller. A2549. The next day, Eleby provided a full statement, in which she claimed that Calvin Alston had confessed to her and Kaye Porter that he and several other people had been involved in the murder. Pet. App. 24a; A2550–51; A2554.[3]

Eleby's statement led the police to Alston. *See* A2264. Alston initially denied any involvement in the crime, A6523–24, but after questioning in which Alston said the police told him he could spend the rest of his life in prison, A6523–28, he eventually provided a statement describing a group assault, A1145–77; A1665–69. Much of what Alston described was objectively false. For example, Alston drew a diagram placing the sexual assault on the south side of the garage, *compare* JA 59 *with* JA 30, yet as the government conceded at a post-conviction evidentiary hearing, "it is most probable" that the sexual assault took place instead where Mrs. Fuller's body was found—in the northeast corner of garage, A2603.

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[3] Porter, who accompanied Eleby to the interview, corroborated Eleby's claim at the time, but she later admitted that she had not heard Alston confess and had lied at Eleby's request. Pet. App. 24a; JA 25–26; JA 298–300; A2555; A2573; *see infra* at 17–18. Eleby's story also later changed, *see, e.g.*, A531–32, and at trial she testified that she had actually seen the attack take place—not that she had only heard about it from Alston, Pet. App. 7a; A539–55; A2574; *see infra* at 8–9.

Alston's statement led investigators to Clifton Yarborough, a teenager with intellectual disabilities who, after being interrogated by the same detectives who interrogated Alston, eventually gave a statement in which he claimed to have witnessed a large group attack Mrs. Fuller. A1028; *see* A151; *see also* A743; A1846–49. Yarborough's statement, like Alston's, was inconsistent with the physical evidence; he said, for example, that Mrs. Fuller was sexually assaulted *outside* the garage, rather than inside where her body was found. A1033.

A few months later, detectives interrogated Harry Bennett about the crime, encouraging him to "come clean and finger others," as they had with Alston. Pet. App. 16a n.11; *see, e.g.*, A2116; A2566. Bennett, too, eventually gave a statement recounting a group attack, but like the others, Bennett got important facts about the crime scene wrong, including where the sexual assault supposedly occurred. A1101.

2. The police ultimately arrested seventeen individuals in connection with Mrs. Fuller's murder; thirteen were indicted, including petitioner Russell Overton. *See* Pet. App. 5a, 119a-120a.[4] Overton was twenty-five at the time. Russell L. Overton, Superior Court of the District of Columbia, Criminal Complaint (Dec. 7, 1984), at 2. All but one of the other defendants were teenagers. Two—Alston and Bennett—agreed to plead guilty and testify for the government. Pet. App. 5a. Another defendant's trial

[4] Overton is sometimes referred to in the record by his nicknames "Bo" and "Bo-Bo." *See, e.g.*, A949; A1672.

was severed when his attorney became ill. *Id.*[5] The remaining ten defendants, including Overton, went to trial in D.C. Superior Court in the fall of 1985. Pet. App. 6a.

a. With no physical evidence to tie any of the defendants to the crime, Alston and Bennett were "[a]t the center of the government's case." Pet. App. 6a. The case against Overton, in particular, was founded primarily on testimony from three purported eyewitnesses who claimed to have seen Overton participate in the attack—Alston, Bennett, and Eleby. But each of them had serious credibility problems: as the prosecution itself recognized (A1751; A2341; A2417), each had lied under oath or offered wildly inconsistent testimony over time. *See* Pet. App. 6a-8a.

Alston and Bennett got numerous details about the crime wrong, changed their stories significantly as time passed, and differed on many key points. *See, e.g.*, Pet. App. 7a ("Bennett and Alston each had made prior inconsistent statements to the police and the grand jury regarding who was present in the park [near where Mrs. Fuller was attacked] and who participated in [the attack]."); A1751 (lead prosecutor agreed that Alston and Bennett had made "several contradictions ... , both between what they had said before and between what each other said"). They even disagreed about Overton's supposed role in the attack. *Compare* A497–98 *with* A404; A410–11. And they received significantly reduced sentenc-

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[5] That defendant, James Campbell, eventually pleaded guilty. Pet. App. 5a.

es in return for testifying against Overton and the other defendants. A517–24 (Alston believed he would serve at least thirty-five years if convicted at trial, but his plea deal reduced his mandatory minimum to fifteen years); A419–25 (plea reduced Bennett's potential jail time to eleven to thirty-one years, from original charges—for Mrs. Fuller's murder, as well as unrelated drug and burglary charges—carrying thirty-six years to life). Unsurprisingly, the jury did not accept everything Alston and Bennett said. The jury acquitted one of Overton's co-defendants, Alphonso Harris, who both Alston and Bennett identified as an active participant in the crime. Pet. App. 12a; A893–909; A5873–74; A6342–47; *see infra* at 11, 32–33.

Eleby was also an unreliable witness—so unreliable that the government itself described her as presenting "a number of problems" for its case. A1001. The lead prosecutor was "very skeptical" of her story, A2417, and found her "very difficult" because she "never took this seriously," A1736; *see id.* ("[I]t was very hard to get [Eleby and another witness, Linda Jacobs] to see how serious this was, that what they were going to say really affected the lives of people."). Eleby, who was only sixteen years old at the time of Mrs. Fuller's death and used PCP, contradicted her own and others' accounts, could not keep names and dates straight, and claimed that she did not remember anything she had told the police or the grand jury. Pet. App. 7a; *see* A1005; A1343. And like Alston's and Bennett's, Eleby's story changed dramatically over time. *See* A1001; A1005; A1660. When first questioned by police—and during months

of repeated interrogations thereafter—Eleby denied having personally witnessed the crime at all. A1001; *see supra* at 5 & n.3. Eleby began to claim that she had actually seen the crime only when she was told that a friend had placed her at the crime scene. A1001; *see also* A572–74 (Eleby stating that she testified before the grand jury and at trial because she was scared of the detective who interrogated her and afraid she would be imprisoned).

Two other witnesses also testified against Overton, but neither claimed to have witnessed the attack on Mrs. Fuller. In fact, the testimony offered by both witnesses was consistent with Overton *not* having participated in the attack or been at the scene when it occurred.

The first, Melvin Montgomery, testified that he was in a park at Eighth and H Streets on October 1, getting high and dealing drugs, and that he saw some of the defendants there, including Overton. A316; A328–32. Montgomery said that one of the defendants was singing a popular Chuck Brown song about "getting paid" and otherwise talking about making and "need[ing] some money." A296; A302; A341–42; A467. Montgomery also testified that he heard someone—he did not know who—say they were going to "get" someone. A302–03. Montgomery testified that he then saw Overton point in the direction of H Street. Although Montgomery said he could see a woman in that direction, he did not know who that woman was or recall anything about what she looked like, and he did not know what Overton was pointing at. A303–04; A345–47. Montgomery then saw a group leave the park and walk up Eighth

Street toward H Street. According to Montgomery, Overton left the park around the same time, but went in a different direction, towards his home—and away from the location where Mrs. Fuller's body was later found. A325; A336; A351. Montgomery did not see Overton, or anyone else, assault Mrs. Fuller. *See* Pet. App. 8a.

Like the other witnesses who testified against Overton, Montgomery's story shifted over time. During his first interview with the police, approximately three months after Mrs. Fuller's death, Montgomery maintained that he knew little about the murder. A319. He later changed course when he was brought back to the police station and told that if he did not tell the police about the crime he "would be involved" and "[t]hey could say [he] had a part of it." A321–22.

The other witness against Overton, Detective Daniel Villars, testified that he overheard co-defendant Christopher Turner, while in custody, say to Overton that they could not be charged because they had never touched Mrs. Fuller's body. Pet. App. 9a; *see* A690. As the government conceded during a later evidentiary hearing, that statement—even as described by the detective—could reasonably be understood as a denial of involvement in the crime. A1755. Turner consistently maintained that he was saying that he had never touched or even seen a body and that he was not present during the crime. A739–40. Detective Villars subsequently lied under oath while testifying in another matter and was placed on a list of officers prohibited from testifying in any case. A1722; A2287–88.

Other evidence presented at trial also suggested that Overton was not involved in Mrs. Fuller's death. For example, non-defendant Maurice Thomas—a purported eyewitness—testified that he saw many of the defendants assault a woman in the alley across Ninth Street, but did *not* see Overton in the group, Pet. App. 8a-9a & 8a n.3; *see* A620–28, even though Thomas knew Overton and Overton is "exceptional[ly]" tall, *Catlett v. United States*, 545 A.2d 1202, 1217 (D.C. 1988); *see* A610; A7389–94. That statement was very significant, since the lead prosecutor himself later labeled Thomas's testimony "[t]he turning point in the trial." A1737–38.

In addition, Overton presented an alibi defense supported by three witnesses. Pet. App. 9a-10a. Marita Michaels, a friend, testified that Overton left the Eighth and H Street park drunk between 2:00 and 2:30 p.m. on the day of the crime. *Id.*; *see* A8619–22. And Overton's grandmother and sister both testified that he had come home drunk and was asleep at the time of Mrs. Fuller's murder. Pet. App. 9a-10a; *see* A721–22; A725; A729–35.

b. The case was submitted to the jury on December 9, 1985. Pet. App. 12a. After a week of deliberations, the jury returned verdicts against eight of Overton's co-defendants—convicting six of them, but acquitting two others, including Alphonso Harris, who both Alston and Bennett had identified as an active participant in the crime. *Id.*; *see* A893–909; A5873–74; A6342–47.

At the same time, the jury announced that unanimous verdicts against Overton and Christopher Turner would be "impossible." JA 246. The court

instructed the jury to keep deliberating. JA 247. Only after forty to fifty more votes, and further claims of impasse, did the jury ultimately convict Overton and Turner. JA 248–50; A925–47; A2045.

The D.C. Court of Appeals affirmed Overton's conviction on direct appeal. Pet. App. 3a.[6] He was sentenced to thirty-five years to life in prison. Am. Sentencing Order (Nov. 23, 1988).

B. The Exculpatory And Impeachment Evidence Withheld By The Government

Overton and his co-defendants have consistently maintained their innocence, even at the risk of jeopardizing their chances for parole. Long after they were convicted, a Washington Post reporter researching the case discovered a statement implicating an alternative perpetrator that had not been turned over to the defense. Discovery subsequently sought by Overton and his co-defendants in post-conviction proceedings initiated as a result of the Washington Post story revealed that the government had suppressed numerous pieces of exculpatory and impeachment evidence. Among other things, the government withheld the following information:

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[6] The court of appeals remanded to the sentencing court to vacate one of Overton's two felony murder convictions as well as the conviction for the predicate felony underlying the murder charge that was permitted to stand, leaving Overton convicted of one count of felony murder and the non-corresponding felony. *Catlett*, 545 A.2d at 1219. It was on re-sentencing thereafter that Overton received a sentence of thirty-five years to life. *See* Am. Sentencing Order (Nov. 23, 1988).

a. *The Blue Evidence.* The government possessed but concealed an eyewitness statement that identified James Blue as Mrs. Fuller's lone killer. Pet. App. 21a-24a. Blue was "a habitual criminal" wholly unrelated to Overton or any of his co-defendants "who, by 1984, had served time for assault and had a record of arrests for rape, sodomy, and armed robbery." Pet. App. 21a-22a. Less than a month after Mrs. Fuller's murder, Ammie Davis told police that she and a friend were "present when the actual homicide took place," JA 58, "in the alley off H Street," JA 56–57. Davis said that they "saw [Blue] grab [the victim] by the back of the neck and pull her into the alley," and that "[h]e beat the fuck out of her." JA 57.

Davis's account was consistent with several independent facts known about the crime. Davis told police that Blue "just got out of jail the same day and killed her for just a few dollars. He got out of jail on Monday and killed her on Monday." JA 56. Her statement thus correctly noted that Mrs. Fuller was robbed at the time of the murder, and that the perpetrator made away with only a small amount of cash. *See* Pet. App. 22a. Davis also knew where and how Mrs. Fuller was killed, accurately stating (unlike some other interviewees, *see, e.g.*, A1385) that the murderer did not attack her with a knife or gun. *See* Pet. App. 22a. And Davis correctly identified the date of Mrs. Fuller's murder—Monday, October 1, on which Blue was released from prison. *Id.*; A1299.

Lieutenant Loney, the police officer who interviewed Davis, sent his report recording her statement to the homicide office, but the report was "lost

in the shuffle" and did not turn up until August 1985, nine months later. JA 264–65; A12315–16. The lead prosecutor interviewed Davis on August 8 and 9, well after the government had formulated its theory that Mrs. Fuller was murdered in a large-group attack. Pet. App. 23a; JA 266–67. The government did not inform Overton or his co-defendants about Davis's statement to Loney, or about her subsequent meetings with prosecutors. Pet. App. 23a; *see* JA 269. At a 2012 evidentiary hearing, the lead prosecutor testified that he kept Davis's claims about Blue from the defense because he did not find her credible and "prosecutors were confident in their body of evidence pointing elsewhere." Pet. App. 23a; JA 270–72. Days before Overton's trial began, Blue shot and killed Davis. Pet. App. 24a; JA 272–73.

b. *The McMillan Evidence.* The government also withheld critical information about another potential alternative perpetrator, James McMillan.

Prior to trial, the prosecution disclosed to defense counsel that William Freeman, the street vendor who discovered Mrs. Fuller's body, stated that he had seen two men in the alley while he was waiting for the police to arrive at the scene, that one of the men appeared to have "something in his coat because it was puffed up," and that the men ran away when the police arrived. A1357; *see* Pet. App. 19a. The government, however, never disclosed that, through a photo array, Mr. Freeman had identified one of the men he saw as McMillan. *See* Pet. App. 19a; A2370–72; *see also* JA 284–85; JA 292. Nor did the government disclose that two *other* witnesses—Jackie Tiley and Charnita Speed—also reported that

they had seen McMillan at the murder scene just before the police arrived. *See* Pet. App. 19a; JA 26–27; JA 27–28; A2355–57. Speed, moreover, told investigators that McMillan was "acting suspiciously" and, specifically, that he had "something under his coat," JA 27–28; *see* A2371–72, a significant detail because the object used to sodomize Mrs. Fuller was never found, Pet. App. 5a.[7]

The police also "knew that McMillan lived on 8th Street about three doors down from the alley [where Mrs. Fuller was killed] and that he had violently assaulted and robbed two other middle-aged women walking in the vicinity three weeks after Fuller's death." Pet. App. 19a-20a; A2364–70.[8] McMillan was viewed as "a potential suspect in the police investigation," Pet. App. 19a; *see* JA 278–79; A2585, and the lead prosecutor deemed the information placing McMillan at the scene sufficiently important

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[7] An additional witness, Clayton Coleman, further corroborated Freeman, Speed, and Tiley's story, but he was unable to identify the two men he saw in the alley. JA 23; *see* A1913–14; A2323–26.

[8] On October 24, 1984, McMillan assaulted D.C. Councilwoman Nadine Winters, then 59 years old, around the 1100 block of K Street N.E. He grabbed her from behind, beat her until she fell down, struck her on top of her head, and grabbed her purse. A1310; A2364; A2412. On October 25, 1984, McMillan was one of two people who attacked 55-year-old Marilyn Ludwig on the 600 block of 12th Street N.E., beating her in the face, breaking her nose, and stealing the bag she was carrying. A1312–13; A2364–66; A2412–13. McMillan was arrested on October 25, and later convicted and sentenced to eight to twenty-five years' imprisonment for both of the assaults. A1310; A1312; A1314; A1323.

to pursue an interview with him, though McMillan refused to talk. JA 27–28. The government, however, never informed the defense that multiple witnesses had placed McMillan at the scene of the crime shortly after it occurred, or about the assaults McMillan committed weeks after Mrs. Fuller was murdered.

McMillan later committed a crime strikingly similar to the attack on Mrs. Fuller. Shortly after he was released from prison in 1992, McMillan (acting alone) robbed, sodomized, and beat to death another woman mere blocks from the site of Mrs. Fuller's death. Pet. App. 20a-21a; *see* Paul Duggan, *Life Without Parole Ordered in D.C. Woman's Slaying*, Wash. Post, Oct. 2, 1993, at 2. At a 2012 post-conviction evidentiary hearing in this case, a forensic pathologist testified that there were "significant similarities" between the attack on Mrs. Fuller and the murder committed by McMillan in 1992. Pet. App. 21a; A2156–57. The defense also stipulated that, if called to testify, a professor and expert in sexual dysfunctions from Johns Hopkins University School of Medicine would attest that someone who commits an act of violent anal sodomy is likely to commit the act more than once. Pet. App. 123a n.17; A12259.[9]

c. *The Luchie Evidence.* Jackie Watts, Willie Luchie, and Ronald Murphy "told investigators that at around 5:30 p.m. on October 1, they happened to be walking through the alley and by the garage where

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[9] Because this last crime occurred after Overton's trial, the court of appeals did not consider it in the materiality analysis. Pet. App. 39a-40a.

Fuller was murdered." Pet. App. 18a. "Luchie and Watts heard the sound of groans coming from inside the garage." *Id.* "According to Luchie, both doors of the garage were closed at this time," *id.*, a significant detail given that Mr. Freeman recalled one of the doors being open when he discovered Mrs. Fuller's body at approximately 6:00 p.m., Pet. App. 5a. "The trio continued on their way without investigating the source of the groans." Pet. App. 18a; *see* JA 25–27; A1240–42. At the 2012 evidentiary hearing, the lead prosecutor "agreed that if the witnesses heard groaning at 5:30 p.m., it meant Fuller was still alive at that time." Pet. App. 18a. "He also agreed that if (counterfactually, in his view) the assault was still in progress at that time, it could not have involved more than one or a very few assailants," *id.*—certainly not the large group the government contended had committed the crime, *see* A13109–13. Yet again, none of this information was disclosed to the defense. Pet. App. 18a.

d. *The Eleby Impeachment.* The government further withheld evidence impeaching Carrie Eleby, a purported eyewitness who at trial implicated Overton and other defendants in the attack. Most importantly, that evidence indicated that Eleby told Kaye Porter, another government witness, to lie to the authorities to implicate another person in the crime. Pet. App. 24a-25a; JA 25–26; JA 298–300; A2573.[10] Specifically, during one of Eleby's early interviews with the police, she denied having wit-

[10] Porter testified at trial, but she did not implicate Overton in the crime. *See* Pet. App. 49a.

nessed Mrs. Fuller's murder, but claimed that Alston had confessed his involvement to her. Pet. App. 24a. Porter, who accompanied Eleby to the interview, corroborated Eleby's claim. Pet. App. 24a-25a. Porter, however, later admitted that she had not witnessed the supposed conversation between Eleby and Alston, and that she had falsely implicated Alston at Eleby's request. Pet. App. 24a.

The government also withheld evidence that the police and prosecution knew that Eleby regularly used PCP and that she had smoked PCP on January 8, 1985, the night she viewed a photo array with investigators. Pet. App. 24a-25a. That information contradicted Eleby's trial testimony about her drug use. *Id.*; *see* A564–65; A1004; A2397–98; A2399; A2402; A2428–29; A2572.

At the 2012 evidentiary hearing, the government's two primary witnesses—Alston and Bennett—asserted that they had fabricated their "eyewitness" testimony under threats from the police officers and prosecutors investigating Mrs. Fuller's murder. Pet. App. 13a-16a. The only remaining eyewitness who identified Overton as a participant in the attack was Eleby, who, aside from all of her other credibility problems, *see supra* at 8–9, multiple times told police that she did not witness the crime and was simply relating information told to her by Alston, A8595–99. Eleby died before Overton and his co-defendants began pursuing post-conviction relief. *See* Patrice Gaines, *A Case of Conviction*, Wash. Post, May 6, 2001.

C. Post-conviction Proceedings

In 2010, Overton and his surviving co-defendants—petitioners in No. 15-1503—filed motions to vacate their convictions pursuant to D.C. Code §§ 23-110 and 22-4135 in D.C. Superior Court, arguing that they did not receive a fair trial because the government withheld exculpatory and impeachment evidence in violation of its constitutional obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and that newly discovered evidence, including witness recantations, established that they were actually innocent of the crimes against Mrs. Fuller and entitled them to relief under the D.C. Innocence Protection Act. Pet. App. 13a.[11]

The court held a three-week evidentiary hearing on the motions. In addition to the withheld evidence, Overton and the other petitioners presented testimony from two experts—a forensic pathologist, and an experienced homicide investigator and expert in violent crime analysis and crime scene reconstruction. Pet. App. 21a, 25a-26a. Both concluded that, based on Mrs. Fuller's injuries and the nature of the crime scene, Mrs. Fuller was more likely attacked by one to three assailants than by a large group. Pet. App. 25a-26a; *see* A2142; A2238–39; *see also* A2132–33 (forensic pathologist agreeing that all of his opinions were stated "to a reasonable degree of medical certainty"); A2229 (crime-scene expert agreeing that his opinions were all to a "reasonable degree of scientific certainty"). In particular, the forensic

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[11] Steven Webb, the remaining co-defendant who was convicted, died in prison. *See* Pet. App. 87a n.3.

pathologist opined that Mrs. Fuller's "injuries were not as extensive or widely distributed as he would have expected to see from a large-group attack, even if some members of the group merely held the victim and did not inflict injury themselves." Pet. App. 26a. He noted, for example, that the injuries Mrs. Fuller sustained from the beating were localized to her head and right torso, while group attacks usually present injuries across more of the victim's body. A2142.

Based on his review of the "the autopsy report, crime scene photos and other investigation records," the crime-scene expert similarly concluded that the attack "was more likely committed by a single offender than by a large group of individuals acting together." Pet. App. 26a; *see* A2203–05; A2233–34; A2237; A2239–41; A2244; A2248–49. "Had there been multiple offenders," he testified, "he would have expected to see the victim's clothing stretched, torn, or ripped, grab marks or abrasions on her ankles, legs, and wrists, more injuries, and multiple sexual assaults rather than just one." Pet. App. 26a. The crime-scene expert also noted that the fact that Mrs. Fuller was found in an undisturbed pool of blood, and that no blood was found elsewhere, showed that Mrs. Fuller was sexually assaulted where her body was found, A2233–34; A2237—which the government agreed was the "most probable" scenario, A2603; *see supra* at 5.

In addition, both experts identified inconsistencies between the purported eyewitness testimony offered at trial and the medical evidence. For example, while Alston testified that Mrs. Fuller had been

struck in the back of the head by a 2x4, A480, there were no injuries to the back of her head, A2134; A2146. And while Alston, Bennett, and Eleby all testified that Mrs. Fuller's legs were held down while she was sexually assaulted, A410–11; A497–98; A553–54, there were no restraint marks on her legs or arms, A2240–41.

After the hearing, the court denied Overton's motion and those filed by the other petitioners. *See* Pet. App. 139a. Addressing the *Brady* claim, the court concluded that the Blue and McMillan evidence was not material because a jury would not have credited Davis's story about Blue and would have concluded either that McMillan came on the scene after Mrs. Fuller was already dead or that he was simply an additional participant in a group attack that also involved the defendants. Pet. App. 124a-129a, 130a-131a. And the suppressed impeachment evidence, the court asserted, was not material because the prosecution's witnesses, including Eleby, had been cross-examined about other lies and inconsistent statements at trial. Pet. App. 132a-133a. The court did not address the Luchie evidence.

The D.C. Court of Appeals affirmed. Pet. App. 84a. As to the *Brady* claim relevant here, the court concluded that the "primary and dispositive question" was "the question of materiality"—that is, whether the withheld evidence, analyzed cumulatively, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Pet. App. 30a-31a (quotation

omitted).[12] The court recognized that the suppressed impeachment evidence was favorable to the defense, but dismissed it as "inconsequential" in the materiality analysis. Pet. App. 58a. And in the court of appeals' view, to establish that the other suppressed evidence was material, Overton and his co-defendants were required to show that there was a reasonable probability that it "would have led the jury to doubt virtually everything that the government's eyewitnesses said about the crime." *Id.* (emphasis omitted). Because the court did not believe Overton had met that standard, it denied his plea for relief. *See* Pet. App. 59a.

SUMMARY OF ARGUMENT

I. Under *Brady* and its progeny, exculpatory and impeachment evidence is material and its suppression violates due process if "there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) (quotations omitted).

II. The evidence suppressed by the prosecution in this case is material under that standard.

A. As this Court's decisions applying and elaborating on *Brady* make clear, materiality depends in part on the strength of the government's case. Where the government's case against a defendant is already weak, even evidence of "relatively minor im-

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[12] The court agreed that the McMillan, Luchie, and Blue evidence, as well as the Eleby impeachment evidence, had been withheld and was favorable to the defense. *See* Pet. App. 48a-49a, 51a-52a.

portance" may be enough to change the outcome of the trial—and therefore be material. *United States v. Agurs*, 427 U.S. 97, 113 (1976).

The government's case against Overton was flimsy even without the suppressed evidence to undermine it. There was no physical evidence tying Overton or any of his co-defendants to the crime. The government's case instead depended on the testimony of three purported eyewitnesses who claimed to have seen Overton participate in the attack—Alston, Bennett, and Eleby. But the jury acquitted a co-defendant that both Alston and Bennett identified as an active participant in the crime, confirming that the jury doubted much of the government's case and rejected at least some of Alston and Bennett's testimony. And among other credibility problems, Eleby—the only other witness who claimed to have seen Overton attack Mrs. Fuller—initially told police she had not witnessed the crime at all. Other testimony presented at trial, including that offered by Montgomery and Thomas, plausibly suggested that Overton was not a participant in the attack, even if the jury accepted the prosecution's large-group-attack theory of the crime.

On that record, it is unsurprising that the jury struggled to convict Overton, deadlocking multiple times and taking more than forty to fifty additional votes before eventually finding him guilty.

B. Especially in such an extraordinarily close case, the evidence withheld by the government here more than suffices to create a "reasonable likelihood" of a different outcome for Overton.

1. To start, the government withheld evidence that multiple witnesses placed at the crime scene an individual known to have robbed and assaulted two other middle-aged women in the same neighborhood. Those witnesses saw James McMillan fleeing as police arrived, and one specifically described him "acting suspiciously" in the alley where Mrs. Fuller's body was found. The prosecution also withheld additional witness statements suggesting that Mrs. Fuller could not have been murdered by the large group the government claimed had committed the crime, because the attack had in fact occurred entirely in the small garage where Mrs. Fuller's body was found.

That evidence would have transformed the trial, providing the defense with significant ammunition to challenge the government's theory of the crime and point the jury to a potential alternative perpetrator—strategies defense counsel were unable to pursue in any meaningful way at trial because the government broadly suppressed the information that would have most powerfully supported such an argument. The court of appeals was able to conclude that the McMillan and Luchie evidence was not material only by doing what this Court has expressly instructed it may not—speculating about which possible interpretation of the suppressed evidence the jury might have credited if it had had the opportunity to consider it. As the Court has repeatedly explained, the fact that it is *possible* that the jury would have reached the same verdict if presented with the suppressed evidence does not make the evidence immaterial. All that is required to show ma-

teriality is a "reasonable likelihood" of a different result, and the McMillan and Luchie evidence withheld by the prosecution here satisfies that standard.

2. The prosecution also suppressed Davis's eyewitness statement identifying *another* individual—James Blue—as Mrs. Fuller's lone assailant. While Davis was murdered before the trial, timely disclosure of her statement would have permitted defense counsel to develop admissible evidence consistent with Davis's claim—for example, by locating the friend Davis said she was with when she witnessed the crime. And much like the suppressed McMillan evidence, evidence pointing to Blue as Mrs. Fuller's killer would have provided the jury with an alternative account of the crime that had nothing to do with Overton or any of the other defendants.

3. In addition to its potential value in developing an alternative-perpetrator defense, the Davis statement, along with the McMillan and Luchie evidence, could have been used to cast doubt on the government's investigation of the case. That evidence would have impelled the jury to consider why investigators focused on a group-attack theory involving the defendants rather than aggressively pursuing other theories, suspects, and leads. The fact that the government managed to lose track of Davis's statement for nine crucial months would have provided further reasons for the jury to doubt the thoroughness of the investigation, and to wonder what else the prosecution might have lost or overlooked. Other evidence withheld by the government, such as the fact that police inappropriately questioned Eleby and Porter together, could also have been used to illus-

trate flaws in the techniques employed by investigators in the case, weakening the prosecution's case and strengthening Overton's defense.

4. That is not all. The government also withheld evidence that purported eyewitness Carrie Eleby, whose testimony was key to the government's case against Overton, had encouraged another witness to lie to investigators to implicate someone else in the crime. That impeachment evidence, too, reasonably could have changed the outcome of Overton's trial.

The jury's split verdict confirms that the jury rejected at least some of what Alston and Bennett—the cooperating witnesses at the heart of the prosecution's case—claimed to have seen. The jury refused to convict based on Alston and Bennett's testimony alone, acquitting a defendant who no other purported eyewitness implicated in the attack. Eleby was the only witness other than Alston and Bennett who claimed to have seen Overton participate in the attack, and it is thus entirely possible that Eleby's testimony made the crucial difference in finally persuading the jury to convict Overton after multiple pleas of deadlock and many dozens of votes.

The Eleby impeachment evidence withheld by the government reasonably could have led the jury to a different conclusion. To be sure, some inconsistencies in Eleby's story were exposed during cross-examination at trial, but the suppressed impeachment evidence was categorically different: it would have revealed to the jury that Eleby had actively sought to generate false inculpatory evidence in this case, raising profoundly serious doubts about whether she was telling the truth about what she herself

claimed to have seen. The evidence also suggested that at least some of the government's witnesses may not have arrived at their accounts independently, challenging the inference that the government's account of the crime was more likely to be true simply because multiple witnesses described a group attack.

Had all of the suppressed evidence been disclosed to the defense, there is at least a "reasonable likelihood" that it would have affected the outcome of Overton's trial. Indeed, there is a very high likelihood it would have produced a different result. Overton was denied due process, and he is entitled to a new trial.

ARGUMENT

I. A Criminal Defendant Is Entitled To A New Trial When The Prosecution Withholds Material Information Favorable To The Defense

This Court has long recognized "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *see id.* (prosecutors do not merely represent "an ordinary party to a controversy" (quotation omitted)). The government's "interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). It is thus "as much [the government's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

Reaffirming those foundational precepts, the Court in *Brady v. Maryland*, 373 U.S. 83 (1963), held that the government's suppression of evidence favorable to a criminal defendant violates due process where the evidence is material to guilt or punishment. *Id.* at 87; *see Smith v. Cain*, 132 S. Ct. 627, 630 (2012) ("Under *Brady*, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment."). The "overriding concern" of the *Brady* rule is "the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. *Brady* protects defendants' fair trial rights by "preserv[ing] the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles v. Whitley*, 514 U.S. 419, 440 (1995).

More than fifty years later, the legal principles governing *Brady* claims are largely settled. A successful *Brady* claim has three components: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler*, 527 U.S. at 281–82. In its opposition to certiorari, the government did not dispute that Overton has satisfied the first two requirements of a *Brady* claim. For good reason: all of the withheld evidence at issue here was obviously favorable to the defense, and the government unquestionably did not disclose any of it. *See* Pet. App. 31a. As this case comes to the Court, the sole question is whether the government's

failure to disclose that evidence was prejudicial to Overton.

To assess the prejudice prong of the *Brady* test, courts ask whether the undisclosed evidence was "material." Evidence favorable to the defense is material, and "constitutional error results from its suppression by the government," *Kyles*, 514 U.S. at 433, if "there is any reasonable likelihood it could have affected the judgment of the jury," *Wearry*, 136 S. Ct. at 1006 (quotations omitted). Materiality "must be evaluated in the context of the entire record." *Agurs*, 427 U.S. at 112. And courts must consider the cumulative effect of all the suppressed evidence favorable to the defense. *Kyles*, 514 U.S. at 421, 436, 441; *see Wearry*, 136 S. Ct. at 1007 (lower court "improperly evaluated the materiality of each piece of evidence in isolation").

This Court has stated unequivocally that the materiality inquiry is not a sufficiency-of-the-evidence test. *See Kyles*, 514 U.S. at 434–35 & 435 n.8; *Strickler*, 527 U.S. at 290. Nor is the question "whether the defendant would more likely than not have received a different verdict with the evidence." *Kyles*, 514 U.S. at 434. The question instead is whether "the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith*, 132 S. Ct. at 630 (alteration in original) (quoting *Kyles*, 514 U.S. at 434). A defendant accordingly "can prevail" on a *Brady* claim "even if ... the undisclosed information may not have affected the jury's verdict." *Wearry*, 136 S. Ct. at 1006 n.6. All that is necessary is a "reasonable likelihood" that it would have.

II. The Exculpatory And Impeachment Evidence Suppressed By The Prosecution In This Case Is Material

Under those well-established principles, this case is not a particularly difficult one. The government's evidence against Overton was not strong even without the suppressed exculpatory and impeachment material to further undermine it. The jury's struggle to reach a verdict as to Overton—a task it declared "impossible" after a week of deliberations, JA 246; *see supra* at 11–12—confirms that the weaknesses in the government's presentation did not go unnoticed. In such circumstances, nearly *any* additional exculpatory or impeachment evidence would undermine confidence in the outcome of Overton's trial. The amount and significance of the evidence suppressed by the government here is substantial by any measure, and it easily satisfies the Court's materiality standard.

A. The Government's Case Against Overton Was Weak, And The Jury Repeatedly Deadlocked Before Reaching A Verdict

The evidence withheld by the government in this case was material as to all of the defendants. But its materiality is especially clear as to Overton because the government's case against Overton was particularly feeble even without the suppressed evidence to cast further doubt on it.

This Court has often observed that where "the verdict is already of questionable validity"—i.e., if the case is close—even "additional evidence of relatively minor importance might be sufficient" to satis-

fy the materiality standard. *Agurs*, 427 U.S. at 113; *accord Wearry*, 136 S. Ct. at 1006; *Smith*, 132 S. Ct. at 630. Here, the lead prosecutor himself conceded that the government's witnesses were not especially strong and that the case "easily could have gone the other way" as to all of the defendants. A1751; A1758. And as even the D.C. Court of Appeals acknowledged, "the evidence against [Overton and co-defendant Christopher Turner] was weaker than that against their co-defendants." Pet. App. 57a.

The jury's actions make clear that it had significant reservations about the government's evidence—and about its case against Overton in particular. After a week of deliberations, numerous votes, and verdicts against eight of Overton's co-defendants, including six convictions and two acquittals, the jury declared unanimous verdicts against Overton and Christopher Turner "impossible." JA 246; *see* JA 247–48. The court instructed the jury to continue deliberating. JA 248–50. After deliberations resumed, one juror sent a note, signed by the foreman, stating that he or she did not want to deliberate further because the jury had taken more than ten votes and still could not reach a verdict as to Overton and Turner. JA 248–49. The court did not reply, and deliberations continued. JA 249. The foreman raised the request to stop deliberating again at the end of the day, but the court responded only that the jury would continue to deliberate. JA 250. Ultimately, the jury took an additional forty to fifty votes before returning a guilty verdict against Overton. A925–47; A2045. And it did so a week before Christmas, after being sequestered and sent home to retrieve

personal items under U.S. Marshal escort. A887; A921–22.

The jury's hesitation about Overton's guilt is not surprising. There was no physical evidence tying Overton (or any of the other defendants) to the crime, a factor this Court and others have frequently recognized as significant in the *Brady* materiality analysis. *See, e.g.*, *Smith*, 132 S. Ct. at 629 (undisclosed statements impeaching eyewitness material where "[n]o other witnesses and no physical evidence implicated [the defendant] in the crime"); *Gantt v. Roe*, 389 F.3d 908, 913, 916 (9th Cir. 2004) (Kozinski, J.) (suppressed exculpatory evidence material when it undermined conviction based on little physical evidence and the state's case overall "was relatively weak"); *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 559–61 (4th Cir. 1999) (suppressed impeachment evidence material where there was no physical evidence and eyewitness testimony was weak); *cf. Strickler*, 527 U.S. at 293 (failure to disclose potential impeachment evidence not prejudicial in part because "there was considerable forensic and other physical evidence linking petitioner to the crime").

The government's case instead rested on the testimony of a handful of purported eyewitnesses. The three witnesses who claimed to have seen Overton participate in the attack, however, all had serious credibility problems. *See supra* at 7–9. The jury acquitted Overton's co-defendant Alphonso Harris even though Alston and Bennett both identified Harris as an active participant in the crime. Pet. App. 12a, 51a; A5873–74; A6342–46. Harris's acquittal con-

firms beyond question that the jury doubted much of the government's case, including portions of Alston and Bennett's testimony, even without the withheld evidence.[13] As the lead prosecutor later observed, it was "perfectly logical" that the jury acquitted Harris, because "only Bennett and Alston" testified against him, and in the lead prosecutor's view "the jurors felt that, without more, we're not going to convict," A1738—i.e., Alston and Bennett's testimony alone was not enough to convince the jury of anyone's guilt. Other than Alston and Bennett, the only witness who testified that she saw Overton participate in the attack on Mrs. Fuller was Eleby. And aside from her other credibility problems (which were substantial), Eleby initially told police that she had not witnessed the attack but had only heard about it from Alston. Pet. App. 7a; *see supra* at 5 & n.3.

Other testimony presented at trial, moreover, suggested Overton was *not* a participant in the attack. Maurice Thomas—who the government in its brief in opposition to certiorari described as "an important eyewitness with no apparent bias or motive to fabricate," Opp. 29 n.12 (quotation omitted)—"affirmatively denied seeing Overton" in the alley, Pet. App. 57a. Another prosecution witness, Montgomery, testified that he saw Overton leave the park and walk toward his home—and away from the alley—before the attack took place. *See supra* at 9–10.

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[13] The government was thus wrong in its opposition to certiorari to suggest that "it [i]s exceedingly unlikely that the jury would have rejected overwhelming eyewitness testimony—including from two participants in the crime [Alston and Bennett]." Opp. 26.

Overton's three alibi witnesses provided further reason for the jury to question whether he was involved. *See supra* at 11. And, as the court of appeals noted, Vincent Gardner—a rebuttal witness for the prosecution, *see* Pet. App. 11a—"did not contradict [Overton and Christopher Turner's] alibis the way he did those of the other defendants," Pet. App. 57a; *see* A1385–86.

B. The Suppressed Evidence Would Have Further Undermined The Government's Already Weak Case Against Overton And Significantly Strengthened His Defense, Creating At Least A Reasonable Likelihood Of A Different Outcome

Where, as here, the government's case is already weak, suppressed evidence does not need to shift the balance between the prosecution's case and the defense very far to undermine confidence in the verdict. *See Agurs*, 427 U.S. at 113. Even evidence of "relatively minor importance" may be material in such circumstances, *id.*, and the information withheld by the prosecution here was of far greater significance than that.

1. The Prosecution Suppressed Evidence That Could Have Been Used To Challenge The Government's Group-Attack Theory And Offer The Jury A Compelling Counter-narrative of the Crime

a. The suppressed McMillan and Luchie evidence would have permitted Overton to present an entirely different type of defense beyond the alibi witnesses he produced at trial. With that evidence, Overton

could have challenged the very core of the government's case—its "group attack" theory of the crime—and pointed to a convincing alternative perpetrator who could have committed the crime on his own.

The McMillan evidence placed at the crime scene, fleeing as police arrived, a man who weeks later violently attacked two other middle-aged women in the same neighborhood. *See supra* at 15 & n.8. Multiple witnesses identified McMillan, and they provided similar accounts of his activities in the alley shortly after Mr. Freeman discovered Mrs. Fuller's body. *See supra* at 14–15. And in her undisclosed statement, Charnita Speed—who was dating McMillan at the time—told investigators that when she saw him in the alley, McMillan was "acting suspiciously" and had "something under his coat." JA 27–28.

That information was very different from what the defense knew at trial, which was only that Mr. Freeman had seen *someone* in the alley while he was waiting for the police to arrive. *See* Pet. App. 19a. The suppressed evidence would have allowed the defense—and the jury—to identify that person: *a known criminal who had violently assaulted other women in the same neighborhood within weeks of Mrs. Fuller's murder*. It also would have corroborated, and elaborated on, Mr. Freeman's account of McMillan's strange behavior at the scene.

The Luchie evidence, meanwhile, suggested that a much smaller group of assailants—or a lone individual, possibly McMillan—committed the crime. Even the court of appeals acknowledged that "[t]he statements of Watts, Luchie, and Murphy had the potential to advance [a] single-perpetrator theory."

Pet. App. 34a. As the court below explained: "The groans heard by Watts and Luchie tend[ed] to show that Fuller was still alive between 5:30 and 5:45 p.m. And the fact that Luchie saw both garage doors closed, while one of the doors was open when William Freeman came by around 6:00 p.m. and discovered Fuller's body, could be taken to suggest that the attack was then-occurring and that the true killer(s) opened one of the doors and fled in the interim. If the attack was in progress when Watts, Luchie, and Murphy walked by the garage, then as [the lead prosecutor] acknowledged, it could not have been committed by a large group of people." Pet. App. 34a-35a; *see also supra* at 17.

The suppressed evidence suggesting that McMillan attacked Mrs. Fuller, or that the crime was otherwise committed by a much smaller group, is "classic *Brady* material." *Williams v. Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) (quoting *Boyette v. Lefevre*, 246 F.3d 76, 91 (2d Cir. 2001)); *see* A14313–14 (government agreeing at post-conviction evidentiary hearing that "when an eyewitness says someone else did it, that is core *Brady* material"); *see also Lambert v. Beard*, 537 F. App'x 78, 86 (3d Cir. 2013) (evidence calling into question number of assailants material). Indeed, in *Brady* itself the Court concluded that evidence suggesting that another person committed the crime was material and that the government's suppression of that evidence violated the defendant's due process rights. *Brady*, 373 U.S. at 84, 86; *cf. Kyles*, 514 U.S. at 445–49 (suppressed inconsistent statements by police informant suggesting that in-

formant sought to frame defendant and had committed crime himself material).[14]

Alternative perpetrator evidence can have a dramatic impact on the course of a criminal trial, because it provides the jury with an explanation for the crime that does not rest on the defendant's involvement. Here, the suppressed McMillan and Luchie evidence would have empowered the defense to offer a compelling alternative account of Mrs. Fuller's murder.[15] Importantly, none of the witnesses who testified at trial directly challenged the government's basic theory of how the crime was committed—i.e., that a large group of young people who had been hanging out in the park at Eighth and H Street saw Mrs. Fuller nearby, decided to rob her, and headed over to the alley where they brutally attacked and murdered her. *See* Pet. App. 53a. Unable to develop a meaningful, cohesive alternative explanation of the

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[14] The courts of appeals, too, have repeatedly held that suppression of evidence pointing to an alternative perpetrator undermines confidence in the outcome of a defendant's trial. *See, e.g.*, *Mendez v. Artuz*, 303 F.3d 411, 412–13 (2d Cir. 2002); *DiLosa v. Cain*, 279 F.3d 259, 263, 265 (5th Cir. 2002); *Castleberry v. Brigano*, 349 F.3d 286, 293 (6th Cir. 2003); *Clemmons v. Delo*, 124 F.3d 944, 947–52 (8th Cir. 1997); *United States v. Jernigan*, 492 F.3d 1050, 1056–57 (9th Cir. 2007) (en banc); *Banks v. Reynolds*, 54 F.3d 1508, 1520–22 (10th Cir. 1995).

[15] At the post-conviction evidentiary hearing, attorney Michele Roberts, who represented Harris at trial, testified that the "counter narrative" the suppressed evidence would have permitted the defense to present "would have been particularly helpful, especially given how the community at large and presumably the jury as well emotionally responded" to the crime and the prosecution's account. A2255.

crime due to the prosecution's suppression of evidence, counsel for each of the defendants was largely left to emphasize the inconsistencies in the testimony provided by the prosecution's witnesses and assert that, whatever else may have been true about how the crime occurred, the defendant they represented was not involved. The McMillan and Luchie evidence, by contrast, would have left the jury no choice but to consider more fundamental questions about how the crime occurred, transforming the trial from a contest about which of the defendants was part of the group that killed Mrs. Fuller to a broader dispute about whether the government's theory of the crime could be believed at all.

The McMillan and Luchie evidence would have had an even more profound effect on the trial than the suppressed evidence deemed material in *Kyles*. In that case, the suppressed evidence would have provided substantial *further* support for an alternative-perpetrator defense the petitioner had *actually presented at trial* through the testimony of several witnesses casting suspicion on another individual. *See Kyles*, 514 U.S. at 430. Here, by contrast, the prosecution's suppression of evidence effectively precluded the defense from presenting *any* credible alternative-perpetrator defense at all—a defense that would have been available, and the jury would have been entitled to credit, had the withheld information been disclosed.

If the jury had been given a concrete basis for questioning the fundamentals of the story the government's key witnesses told, there is at least a "reasonable likelihood" its doubts would have been suffi-

cient to result in Overton's acquittal. The "young," "inarticulate" witnesses on which the government's case was built all had significant credibility problems. JA 193; *see supra* at 7–9. Even without the suppressed evidence, the jury did not blindly accept their testimony, acquitting Harris and struggling to reach verdicts against Overton and Christopher Turner. Presented with testimony that challenged the government's core theory of the crime—like the McMillan and Luchie evidence—the jury reasonably could have concluded that there were so many holes and inconsistencies in the testimony offered by the government's key witnesses because the story they were telling about the crime simply was not accurate, and that the events occurred a very different way.

In particular, the suppressed McMillan and Luchie evidence could have been combined with other trial evidence to establish a distinct, single-perpetrator theory of the attack. For example, Mr. Freeman "testified at trial that throughout his day at 8th and H Streets, working as a street vendor, he never saw a large group of young people in the area, never saw anyone running towards or away from the vicinity of the garage, and never heard any shouts coming from the area of the garage." Pet. App. 53a n.79; *see* A246–47. And had Overton and his co-defendants known there was additional evidence suggesting that a single perpetrator or much smaller group had committed the crime, they also could have developed the type of analysis of the physical evidence presented at the post-conviction evidentiary hearing in 2012. *See supra* at 19–21; Pet. App. 26a.

Short of incontrovertible proof that the defendant could not have committed the crime, it is difficult to imagine a type of evidence more important to the defense than the McMillan and Luchie evidence suppressed here. That evidence is exactly the type of information that "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

b. The court of appeals concluded otherwise only by disregarding this Court's proscription against improperly "emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not." *Wearry*, 136 S. Ct. at 1007; *see Smith*, 132 S. Ct. at 630 (possibility that "the jury *could* have disbelieved" the undisclosed evidence does not create "confidence that it *would* have done so"); *id.* (refusing to "speculate about which of [the eyewitness's] contradictory declarations the jury would have believed" had it been permitted to consider undisclosed statements).

Considering the Luchie evidence, for instance, the court of appeals proposed that it was "far more likely ... that the jury would have believed that Luchie was mistaken" in recalling that the garage doors were closed when he passed through the alley around 5:30 p.m., "or that someone came upon the scene and opened the garage door in the interval between Luchie's departure and Freeman's arrival, than that the jury would have thought it plausible that all the government's witnesses were lying and that Luchie had stumbled upon an assault in progress." Pet. App. 54a; *see id.* at 35a ("Luchie might

have been mistaken in recalling that both garage doors were closed"). The court of appeals also speculated that "the jury might have suspected that McMillan arrived on the scene only after Watts and Luchie departed (but before Freeman arrived), and that he and his companion Merkerson looked in the garage—providing an explanation for Luchie's and Freeman's observations of the garage door that did not rely on the supposition that the assailants were still present when Luchie was there." Pet. App. 55a. It was "not implausible," the court submitted, "that McMillan heard about the attack and decided to look in out of curiosity; nor that he carried away something from the garage, explaining his suspicious behavior." Pet. App. 55a n.51. And, the court of appeals suggested, the suppressed McMillan evidence "perhaps could have led the jury to suspect that he participated in the attack on Fuller," Pet. App. 55a—i.e., the jury could have believed that McMillan committed the crime *with* Overton and his co-defendants.

The interpretations offered by the court of appeals, however, are far from the only plausible inferences the jury could have drawn from the McMillan and Luchie evidence. For example, while the court suggested that the jury might have believed McMillan was another participant in the large-group attack described by the prosecution, none of the witnesses who placed McMillan in the alley shortly after Mrs. Fuller's murder claimed to have seen him with a large group or with any of the defendants. All of them saw McMillan with one other individual, identified as Gerald Merkerson. *See* Pet. App. 122a;

JA 24; JA 26–27. Further, neither of McMillan's assaults in the weeks following Mrs. Fuller's murder involved a large group—he committed one by himself and the other with only one other person. *See supra* at 15 n.8. There is thus no reason the jury necessarily would have believed that, if McMillan was involved in Mrs. Fuller's death, it must have been as a participant in a large-group attack. Indeed, the jury might well have inferred from the McMillan and Luchie evidence that McMillan was in the garage committing the crime at the time Luchie and his group passed through the alley—i.e., that the government's entire theory of the crime was inaccurate. *See* A2353 (lead prosecutor agreeing at 2012 evidentiary hearing that the Luchie evidence suggests "there was a single person in the garage with [Mrs. Fuller]").

The Luchie evidence, moreover, might have persuaded the jury that Mrs. Fuller was murdered by an individual or a much smaller group—one that could fit inside the garage with the door closed—even if the jury was not convinced that McMillan was the lone perpetrator or thought McMillan might have participated in the crime alongside some subset of the group posited by the government. Even in those circumstances, the jury might well have acquitted Overton, as the jury had the greatest doubts about whether Overton and co-defendant Christopher Turner were involved even absent the suppressed evidence, repeatedly deadlocking before ultimately declaring them guilty.

It is, of course, conceivable that a jury presented with a choice between the government's group-attack

theory and an alternative account supported by the McMillan and Luchie evidence might have accepted that the crime occurred the way the government theorized. But it is also plausible that the jury would have reached a different conclusion if provided all the evidence. Nothing more is needed to establish materiality—a defendant need not wholly eliminate the possibility that the jury's verdict would have remained unchanged. *See Wearry*, 136 S. Ct. at 1006 n.6 (defendant "can prevail [on a *Brady* claim] even if ... the undisclosed information may not have affected the jury's verdict"); *Kyles*, 514 U.S. at 454 (suppressed evidence material where it would have left the prosecution with "a significantly weaker case than the one heard by the first jury, which could not even reach a verdict"). A defendant instead need only show that the suppressed evidence creates a "reasonable likelihood" of a different result—a standard easily satisfied here.

2. *The Suppressed Statement Identifying James Blue As Mrs. Fuller's Lone Assailant Could Have Provided Further Support For An Alternative, Single-Perpetrator Theory Of The Crime*

For the reasons explained, the McMillan and Luchie evidence alone is material. But had the government timely provided defense counsel with Davis's statement, the defense might have had not one but *two* potential alternative perpetrators to present to the jury.

Davis identified Blue, a "habitual criminal" with a record of arrests for rape, sodomy, and armed robbery, as Mrs. Fuller's lone killer. Pet. App. 21a. As

the lead prosecutor acknowledged at the 2012 evidentiary hearing, Davis's statement to police about Blue lined up with several objective facts known about the crime. Pet. App. 23a; *see supra* at 13. Davis "accurately stated" the date and location of the murder. Pet. App. 23a. She also knew that Mrs. Fuller "was not attacked with a knife or a gun," *id.*, and that she had been robbed of a small amount of money, *see* Pet. App. 22a. That type of eyewitness identification of an alternative perpetrator is ordinarily classic, core *Brady* material. *See supra* at 36–37 & n.14.

Because Blue shot and killed Davis just prior to Overton's trial, the court of appeals concluded that her statement would not have been admissible to show that Blue killed Mrs. Fuller, as Davis would not have been available to testify. Pet. App. 40a. If Davis's statement had been *timely* disclosed, however, Overton would have had an opportunity to develop admissible evidence supporting Davis's account. *See United States v. Morales*, 746 F.3d 310, 314–15 (7th Cir. 2014) (noting that majority of federal courts of appeals recognize that inadmissible evidence may be material if it could have led to the discovery of admissible evidence and finding "the Court's methodology in *Wood* [*v. Bartholomew*, 516 U.S. 1, 8–10 (1995)] to be more consistent with the majority view in the courts of appeals ... than ... a rule that restricts *Brady* to formally admissible evidence" (citing cases)); *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001) (*Brady* requires that the government "make sufficient disclosure in sufficient time to afford the

defense an opportunity for use").[16] Defense counsel certainly would have sought to interview Davis long before trial (and before her death), and would have at least tried to persuade her to stay away from Blue. At a minimum, the defense would have done everything in its power to locate Davis's friend "Shorty," who Davis said she was with when she saw Blue attack Mrs. Fuller and who likely would have been able to testify at trial.[17] *See* Pet. App. 22a,

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[16] *See also, e.g.*, *United States v. Garner*, 507 F.3d 399, 405 (6th Cir. 2007) ("*Brady* requires a showing that there is a 'reasonable probability' that had the evidence been *timely* disclosed to the defense the outcome would have been different." (emphasis added)); *United States v. Gray*, 52 F. App'x 945, 948 (9th Cir. 2002) ("Disclosure, to escape the *Brady* sanction, must be made at a time when the disclosure would be of value to the accused." (quotation omitted)).

[17] In its opposition to certiorari, the government suggested that even if it had turned over Davis's statement, defense counsel would not have uncovered anything helpful as a result, because the government's own efforts to locate a witness to corroborate Davis's claims were fruitless. Opp. 23 n.9. But the government was hardly motivated to search far and wide—the government did not even believe Davis's account and indeed lost the report recording her statement for nine months. By contrast, defense counsel would have been *highly* motivated to find a witness to corroborate Davis's claim, as testimony identifying Blue as Mrs. Fuller's lone assailant would have had a dramatic impact on the defense's presentation at trial. The government itself, moreover, was able to locate a witness to further support *its* case (Linda Jacobs) after months of searching based on little more than her nickname, "Smurfette," A2297–99; *see* A1009 (notes indicating that investigators "had a hard time finding" Jacobs); *see also* A1660; A1663, confirming that it is entirely likely that highly motivated defense counsel could have located "Shorty" based on the information Davis provided about her.

126a; JA 57; JA 266–68. If Overton had succeeded in developing admissible evidence that Blue committed the crime, that evidence could have been used in much the same way as the suppressed McMillan evidence—to provide the jury with an account of Mrs. Fuller's murder that did not involve the defendants, and to cast doubt on the theory underlying the government's already-shaky case against Overton.

3. The Suppressed Evidence Would Have Enabled The Defense To Challenge The Thoroughness And Accuracy Of The Investigation, Further Weakening The Prosecution's Case

Apart from its value in providing the jury an alternative explanation for the crime, the suppressed McMillan, Luchie, and Blue evidence could also have been used to challenge the "thoroughness" and "reliability of the investigation." *Kyles*, 514 U.S. at 445–46.[18] Taken together, the government's suppression of the McMillan, Luchie, and Blue evidence suggests a troubling pattern—once police and prosecutors developed their group-attack theory early in the investigation, they repeatedly marginalized, ignored, and withheld from the defense evidence that did not fit the government's narrative. The jury, however, had little reason to doubt the government's decision to focus on Overton and the other defendants as its suspects in Mrs. Fuller's murder, because the jury

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[18] As the court of appeals agreed, Davis's statement about Blue would have been admissible for this purpose even though she was not available to testify at trial. *See* Pet. App. 40a-41a n.56, 47a.

had no idea that anyone had made a statement pointing in an entirely different direction. Indeed, the lead prosecutor told the jury in his closing that the jury had heard all the "witnesses who came forward" through "an exhaustive and intense police investigation." JA 239. The jury would have had a markedly different perspective on the investigation if the defense had been able to use the suppressed evidence to "cast doubt on police officers' decision to focus their attention ... on [the defendants] rather than" energetically pursuing other suspects—like McMillan and Blue. *Trammell v. McKune*, 485 F.3d 546, 551 (10th Cir. 2007); *see Kyles*, 514 U.S. at 442 n.13 (undisclosed evidence would have allowed the defense to "cross-examin[e] ... the police on their failure to direct any investigation against Beanie," an individual who had provided the police with information implicating Kyles and who the defense argued was the actual perpetrator).

Further, the government's failure to so much as follow up on Davis's statement for many months raises serious questions about the thoroughness of the government's investigation and could have been used to fuel an "argument that the police had been guilty of negligence." *Kyles*, 514 U.S. at 447. It is hard to imagine a lead more significant in the investigation of a murder—particularly one where there is no physical evidence tying anyone to the crime—than the statement of an eyewitness claiming to have seen the offense as it was occurring and naming the individual who committed it. That a report containing such critical information managed to get "lost in the shuffle" for nine months without anyone

looking into it, *see* JA 264–65; A12315–16, surely would have prompted the jury to contemplate what other information the prosecution might have overlooked or misplaced—including other information inconsistent with the theory advanced by the government at trial.

Other evidence withheld by the government could also have been used to show that those investigating and prosecuting the case used sloppy techniques and demonstrated tunnel vision. *See Kyles*, 514 U.S. at 446 (quoting *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (finding *Brady* violation where withheld evidence "carried within it the potential ... for the ... discrediting ... of the police methods employed in assembling the case")). For instance, the government failed to disclose the fact that detectives questioned two witnesses—Carrie Eleby and Kaye Porter—together in the same room, which allowed Eleby to induce Porter to give a false statement. A1002; A2382. The government also did not disclose that Eleby had viewed a photo array and provided information about the investigation while she was high on drugs. A2397–98.

Particularly in a case like this one, where the jury already viewed the purported eyewitness testimony with some well-founded skepticism, the less than "conscientious" approach to the investigation revealed by the suppressed evidence could well have further diminished the jury's confidence in those witnesses' shaky accounts. *Kyles*, 514 U.S. at 446 n.15. That there was evidence directly tying some of those questions about the investigation to the development of *Eleby*'s role in the case is all the more sig-

nificant given the critical importance of her testimony in the jury's decision to convict Overton. *See infra* at 50.

In short, here, as in *Kyles*, "[t]here was a considerable amount of ... *Brady* evidence on which the defense could have attacked the investigation as shoddy." *Kyles*, 514 U.S. at 442 n.13. And here, as in *Kyles*, that information strongly reinforces the conclusion that the "net effect of the evidence withheld by the [prosecution] ... raises a reasonable probability that its disclosure would have produced a different result." *Id.* at 421–22; *see id.* at 453–54 (discussing role of evidence casting doubt on investigation in cumulative materiality analysis).

4. The Government Withheld Evidence That Would Have Impeached Purported Eyewitness Carrie Eleby's Testimony In A Powerful New Way, Which Alone Could Have Resulted In An Acquittal

The evidence described above, pointing to two potential alternative perpetrators and suggesting that Mrs. Fuller was attacked by an individual or a much smaller group than the government contended, more than suffices to establish that Overton is entitled to a new trial under *Brady*. But there is more: the government also withheld from the defense evidence that could have been used to impeach purported eyewitness Carrie Eleby in a new and powerful way, seriously discrediting the witness who may well have been the linchpin of the government's case against Overton. *See supra* at 33. That evidence, too, reasonably could have changed the outcome of Overton's trial.

The jury's decision to acquit Harris despite the fact that both Alston and Bennett identified him as an active participant in the crime confirms beyond question that the jury disbelieved some aspects of the star witnesses' testimony, including their testimony about who they saw committing the crime, even assuming that the jury credited Alston and Bennett's general story about how the crime occurred. *See supra* at 32–33. Even the lead prosecutor recognized that the jury's split verdict demonstrated that Alston and Bennett's testimony was not enough to convince the jury to convict any of the defendants. *See* A1738; *supra* at 33. And the only purported eyewitness to the attack who testified against Overton but did not testify against Harris was Eleby. It is thus entirely possible—indeed, probable—that Eleby's testimony alone explains why Overton was convicted while Harris was not.

Against that backdrop, the Eleby impeachment evidence is itself sufficient to undermine confidence in the jury's verdict as to Overton. The suppression of evidence tending to impeach a key witness is a cardinal *Brady* violation. In *Giglio v. United States*, 405 U.S. 150 (1972), for instance, the prosecution did not disclose that it had promised "the only witness linking petitioner with the crime" that he would not be prosecuted if he cooperated with the government. *Id.* at 151, 153. The Court concluded that the withheld information indisputably was "relevant to [the key witness's] credibility and the jury was entitled to know of it." *Id.* at 154–55. The Court therefore reversed the defendant's conviction and remanded for a new trial. *Id.* at 155. Likewise, in *Smith*, the

Court held that undisclosed statements that contradicted the key government witness's testimony at trial were "plainly material." *Smith*, 132 S. Ct. at 630; *see also Banks v. Dretke*, 540 U.S. 668, 675, 701 (2004) (suppression of impeachment evidence violated *Brady* where the relevant witness's "testimony was the centerpiece of the ... prosecution's penalty-phase case").

It is well established that suppressed evidence impeaching a key prosecution witness may be material even where it would leave substantial portions of the prosecution's case—including testimony from other purported eyewitnesses—unaffected. *Kyles*, 514 U.S. at 445 ("[T]he effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." (citing *Agurs*, 427 U.S. at 112–13 & n.21)); *see also id.* at 435 n.8 (suppressed evidence "would have left two [of four] prosecution witnesses totally untouched" (quotation omitted)); *id.* at 451 (defendant need not show that "every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed"). And while Eleby was not the only witness against Overton, she was likely the *decisive* witness against him—even the lead prosecutor recognized that without her testimony the jury almost certainly would not have convicted Overton. *See* A1738; *supra* at 33.

Given the jury's refusal to convict based on the testimony of Alston and Bennett alone, Eleby's credibility was not just a major issue; it may well have been determinative in the jury's decision to convict Overton. The evidence withheld by the government

would have enabled Overton to mount a forceful new challenge to Eleby's credibility, as it showed that she had encouraged another witness to lie to investigators in this case to implicate someone else in the crime—and that that witness had initially done as Eleby asked. That evidence was of a fundamentally different kind than the evidence with which the defense previously sought to discredit Eleby's testimony. The suppressed evidence did not merely suggest that Eleby was reluctant to say what she'd seen or sometimes struggled with a poor memory. The evidence instead established—conclusively—that she had *actively sought to fabricate evidence in this case.* Not only would that information have grossly undermined Eleby's testimony, it also would have raised a potential explanation for why multiple government witnesses told broadly similar (though far from fully consistent) stories about how the crime occurred that did not depend on those accounts being true.

The court of appeals asserted that the suppressed impeachment evidence would not have made a difference to the outcome, for Overton or anyone else, because the defense impeached Eleby by other means at trial. Pet. App. 50a. This Court, however, has recognized that impeachment evidence can be material even if it involves a witness who already has been subject to impeachment. In *Wearry*, for example, the Court concluded that suppressed impeachment evidence was material where a key prosecution witness's "credibility, already impugned by his many inconsistent stories, would have been further diminished" by the evidence the government

withheld, which included evidence that the witness "had coached another inmate to lie about the murder." 136 S. Ct. at 1006; *see also Kyles*, 514 U.S. at 443 n.14 (inconsistencies in key witness's testimony at first and second trials, which defense could have drawn out even without the suppressed impeachment material, "provided opportunities for chipping away on cross-examination but not for the assault that was warranted").

Because Eleby was one of only three witnesses who claimed to have seen Overton participate in the attack—and because there is no question the jury did not fully credit the testimony of the other two, both of whom agreed to testify in exchange for a reduced sentence—even an incremental erosion of her credibility reasonably could have affected the outcome of Overton's trial. *See United States v. Bagley*, 473 U.S. 667, 676 (1985) (impeachment evidence, "if disclosed and used effectively, ... may make the difference between conviction and acquittal"); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence[.]"). The suppressed evidence that Eleby prompted another witness to lie to investigators to implicate someone in the crime and corroborate Eleby's own statement would have discredited her far more than that.

* * *

When viewed, as it must be, cumulatively and in light of the entire record, there is no serious question that the suppressed evidence would have further weakened the government's case against Overton

and strengthened Overton's defense, erasing all confidence in his already "impossibl[y]" close verdict. JA 246. That evidence would have provided the jury with an alternative perpetrator, undercut the government's group-attack theory of the crime, presented questions about the thoroughness and accuracy of the government's investigation of the crime not apparent from the record at trial, and supplied an additional, distinct reason for the jury to doubt the testimony of the likely dispositive purported eyewitness against Overton. That evidence is so significant that it would be material in almost any case, and it is material as to all of the petitioners here. But its potential to alter the outcome is especially clear in an exceptionally close case like Overton's, where the prosecution secured a conviction by the narrowest of margins. Overton is entitled to a new trial that comports with the requirements of due process.

CONCLUSION

For the foregoing reasons, the judgment of the D.C. Court of Appeals should be reversed, and Overton's conviction should be vacated.

Respectfully submitted,

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